

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

CIVIL REVISION APPLICATION (St) No. 1611 of 2018

1. Rajani wd/o Ramchandra Prabhupatkar }	
2. Sanjay Ramchandra Prabhupatkar	
3. Vishwanath Ramchandra Prabhupatkar	
4. Vasudeo Ramchandra Prabhupatkar }	
5. Veena w/o Yashwant Sawant	
6. Mukund Ramchandra Prabhupatkar	.. Applicants
	} (Ori.Deft nos.2 to 7)

vs

1. Satish Raghunandan Rele }	
2. Nandalal Raghunandan Rele	.. Respondents
	} (Orig.Plaintiffs)
3. Shrikrishna Mahadev Gavankar }	.. Respondent
	(Orig.Deft no.1)

Mr.S.S.Deokar for Applicants
Mr.S.J.Ghogare for Respondents

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Coram : G.S.KULKARNI, J.

Dated : 14.2.2018

P.C

1. The applicants are before the Court challenging the judgement and order dated 6.12.2017 passed by the appellate Bench of the Small Causes Court at Mumbai allowing the appeal filed by respondent nos.1 and 2 against the judgement and order dated 26.2.2013 of the learned trial Judge who dismissed the eviction suit of the respondent nos.1 and 2.The appellate bench has decreed the eviction suit

of respondent nos.1 and 2 and has directed the applicants to hand over possession of the suit premises to the respondent nos.1 and 2-plaintiffs.

In nutshell, the facts are:

2. The respondent nos.1 and 2-plaintiffs are the owners and landlords of property known as 22-A and 22-B, Rele Building Borbhat Lane, (Krantiveer Rajguru Marg), Girgaum, Mumbai-400 004 City Survey no.203. (for short the "suit building"). Respondent no.3 is the son of Madhav Abaji Gavankar who was the original tenant of respondent nos.1 and 2 of premises no.22-B an eating house situated on the ground floor of the suit building (for short "the suit premises.") The suit premises admeasure about 800 sq.ft.

3. Madhav Abaji Gavankar the original tenant expired in the year 1968. During his life time in the suit premises he had started an eating house business in the name and style of "Samarth Club" for which he was granted the permission by the Municipal Corporation. After his demise, he was survived by wife Gangabai Mahadeo Gavankar and son Shrikrishna Mahadeo Gavankar-respondent no.3).The tenancy rights of the suit premises had devolved upon them. Wife Gangabai Mahadeo Gavankar also expired on 29.9.1991 and consequently the rent receipt was issued in the name of respondent no.3-Srikrishna Mahadeo Gavankar.

4. However, during the life time of late Gangabai Mahadeo Gavankar, she had allowed one Ramchandra Sahadeo Prabhupatkar to conduct the business of the said eating house conducted in the name of "Samarth Club". A writing styled as a conducting agreement dated 2.5.1976 which was for a period of 11 months was executed by late Gangabai Mahadeo Gavankar in favour of Ramchandra Sahadeo Prabhupatkar. This is stated to be despite the fact that late Gangabai Mahadeo Gavankar was not holding a licence of a eating house from the concerned department of the Bombay Municipal Corporation. In the year 1981 Ramchandra Prabhupatkar the said licensee of late Gangabai Mahadeo Gavankar instituted R.A.D.Suit no.2509 of 1981 seeking a declaration that though he had come in occupation of the premises under the said conducting agreement/leave and licence agreement (dated 1.2.1972) he had become a tenant of respondent nos. 1 and 2-landlords. The said suit was dismissed by the learned trial Judge. An appeal before the appellate bench also failed. During the pendency of the appeal, Ramchandra expired. On Ramchandra Sahadeo Prabhupatkar having expired, the applicants (Original defendant nos.1 to 7) who are stated to have inherited the rights and interest of late Ramchandra Sahadeo Prabhupatkar are pursuing the proceedings. A Civil Revision Application

No.141 of 2014 which was filed by the legal heirs of Ramchandra Sahadeo Prabhupatkar was also dismissed by the learned Single Judge of this Court by an order dated 15.2.2017. The following observations of this Court in the order dated 15.2.2017 are required to be noted:

“ The applicants have challenged the concurrent judgements and orders passed by the learned Small Cause Court Judge, Mumbai and the Appellate Bench of the Small Cause Court Mumbai whereby the suit filed by the Applicants for declaring that they have tenancy rights in respect of the suit premises and the appeal have been dismissed. The suit premises is a commercial premises in which a business of restaurant-cum-hotel was being run.

2. *The applicants filed a suit stating that since the year 1972. The Applicants are in possession of the suit premises. Respondent no.1 is the original tenant of Respondent no.2 landlord. It is the case of the applicants that the suit premises was given on leave and licence by an agreement dated 1 December 1972. It was contended that since Respondent no.1 started asserting that the applicants have no right in the suit premises the applicants filed R.A.D.Suit no.2909/1981 for a declaration that they have become the tenants by virtue of section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Respondents filed their written statement. Respondent no.2-landlord denied that any tenancy agreement exists between respondent no.2-landlord and the applicants. Both the courts after analysing the evidence on record and the agreement dated 1 December 1972 concluded that it was merely a conducting licence and no rights are created in favour of the applicants. The learned Small Cause Court Judge dismissed the suit by order dated 22 August... and the Appeal 2 (B) (ii) No.674/2006 filed by the applicants was dismissed by the appellate bench by the judgement and order dated 13 July 2011.*

3. *Heard Mr.Shyam Deokar, the learned counsel for the applicants and Mr.Sandip Ghogare the learned counsel for the respondent nos. 2(a) to 2 (d).*

4. *The learned counsel for the applicants submitted that the applicants had paid the rent to the respondent-landlord and right from the inception, respondent no.1 was not in occupation. He submitted that under section 15A of the Act of 1947, even agreement such as the present one are covered and the applicants are entitled for statutory protection.*

5. *Both the Courts have analysed the agreement dated 1 December 1972 and have found that the terms and conditions of the agreement merely stipulates that the business of running the restaurant was given to the applicants on conducting*

basis. The documents in which the applicants is shown as a conductor were also referred to. The fact of payment of rent is heavily relied upon by the learned counsel for the applicants. The learned counsel for respondent nos.2 (a) to 2(d) pointed out that the receipts have been issued in the name of respondent no.1. If the applicants claimed themselves to be tenants of the suit premises, they would have objected to the rent receipts being issued in the name of respondent no.1. Merely because, money may have been paid on behalf of respondent no.1 it will not alter the character of the conducting licence. For protection under section 15A of the Act of 1947, a person must be 'licensee' and excludes a person conducting or running a business. Therefore, this arrangement whereby the original tenant had given on only the right to conduct the business would not result in the applicants being declared as tenant of the landlord. In these circumstances, the view taken by both the Courts cannot be stated to be without jurisdiction or perverse. The civil revision application is accordingly rejected."

5. As regards the respondent no.3-tenant he was a defaulter in payment of rent as stated by respondent nos.1 and 2-landlords. Initially the monthly rent of the suit premises was Rs.300/- per month and from to time it was increased and was increased to Rs.693.68 per month from April 2009 to December 2009, which the respondent no.3 tenant had failed to pay. Respondent no.3 was in arrears of rent since November 1996. The respondent nos.1 and 2-landlords by their advocate's notice dated 8.1.2010 addressed to respondent no.3 who was the statutory tenant of the suit premises demanded the arrears of rent for the period November 1996 till December 2009 which were amounting to Rs.85,902/- and also terminated the tenancy of the suit premises.

6. On the above factual background, the respondent nos.1 and 2 -landlords filed the suit in question being R.A.E.& R.Suit no.758/1121/2010 seeking eviction of the tenant respondent no.3 (tenant) as also against the applicants who were stated to be the illegal occupants of the suit premises. The

eviction of respondent no.3 tenant was sought on the ground of change of user, unlawful sub-letting, arrears of rent, bonafide and reasonable requirement of the respondent nos.1 and 2-plaintiffs. In the plaint, the respondent nos.1 and 2 averred that the applicants were illegally inducted by deceased Gangabai without written permission of the landlord-respondent nos.1 and 2 under a conducting/leave and licence agreement dated 2.5.1976 which was only for a period of 11 months. It was stated that even otherwise as per the terms of the said agreement with the tenant the applicants were in illegal occupation of the premises, as the said leave and licence/conducting agreement itself had come to an end on 2.4.1977. Further, late Gangabai herself was not holding a licence of a eating house from the Municipal Corporation and therefore, there was no question of late Gangabai inducting the applicants. There was a clear change of user by respondent no.3-tenant in inducting the applicant's father and permitting him to conduct the business of a eating house as also residing therein without the consent and written permission of respondent nos.1 and 2-plaintiffs. That the inductee Ramchandra had also filed suit being R.A.D.Suit no.2909 of 1981 where he had sought a declaration of their tenancy rights against the respondent nos.1 and 2-plaintiffs which had failed and had attained finality.

7. The tenant-respondent no.3 (defendant no1) did not appear to defend the suit, hence the suit proceeded ex-parte against him as per order dated 28.6.2011 passed by the learned trial Judge,. The applicants-defendants nos.2 to 7 filed their written statement and contested the suit. The learned trial

Judge by his judgement and order dated 26.2.2013 dismissed the suit of respondent nos.1 and 2-plaintiffs thereby holding that there was no change of user as initially the tenant-Mahadeo Abai Gavankar was running a eating house and after his death, his wife late Gangabai and son respondent no.3 (defendant no.1) were conducting the same business and later on, it was let out to Ramchandra Sahadeo Prabhupatkar and hence there was no change of user. In regard to the ground of unlawful sub-letting, the learned trial Judge held that as respondent nos.1 and 2 had knowledge that the premises were let out to Ramchandra Mahadeo Prabhupatkar and later on the applicants were using as also respondent nos.1 and 2 were aware that occupation charges in respect of the suit premises were being deposited by the applicants in Court in R.A.E.& R Suit no.758-1121/2010 filed by their father in the year 1981, it was observed that thus it cannot be said that the premises were unlawfully sublet. It was further observed that there was no notice issued to the applicants/defendant no.2 to 7 for terminating the tenancy. As regards the ground of arrears of rent, it was observed by the learned trial Judge that the evidence of plaintiff has gone unchallenged and held that the respondent no.3 (defendant no.1) was in arrears of rent, however on the ground that only the tenancy of defendant no.1 was terminated and that the tenant/defendant no.1 (respondent no.3) had sub-let the suit premises to the applicants and as no notice was issued to the applicants, the suit cannot be decreed against the applicants for arrears of rent. In regard to the ground of bonafide requirement, it was held that the suit premises were

occupied by the applicants as commercial-cum-residential premises and if a decree of eviction is passed, greater hardship would be caused to the applicants. Thus, the ground of bonafide requirement was not accepted.

8. Respondent nos.1 and 2-plaintiffs being aggrieved by dismissal of the suit approached the appellate bench of the Small Causes Court in Appeal No.45 of 2013. The applicants filed Cross-objections no.20 of 2014 on the ground that the case of the applicants regarding jurisdiction and maintainability of the suit was not considered by the learned trial Judge.

9. By the impugned judgment and order, the appellate bench of the Small Causes Court has allowed the appeal filed by respondent nos.1 and 2 (plaintiffs) thereby decreeing the suit of respondent nos.1 and 2 in the following terms:

1. *“Appeal No.45 of 2013 is allowed.*

2. *Cross Objection no.20 of 2014 is dismissed.*

3. *The judgement and decree of the learned trial Judge dated 26/02/2013 passed in RAE & R Suit No.758/1121 of 2010 is hereby quashed and set aside and in its place the following order is substituted:*

a) *“The suit is decreed with costs.*

b) *Defendants do deliver quiet,vacant and peaceful possession of the suit premiss via Eating house situated on the ground floor,22-B Rele Building, Borbhat Lane, Girgaum, Mumbai-400 004 to plaintiffs within 60 days from today.*

c) *Defendants shall not create any third party interest in the suit premises till the handing over of possession.*

d) *Decree be drawn up accordingly.”*

10. In decreeing the suit of respondent nos.1 and 2, the appellate bench held that the respondent nos.1 and 2-plaintiffs, had proved that there was change of user of the suit premises by the tenant-respondent no.3. It was further held that the respondent nos.1 and 2- plaintiffs had also proved that the respondent no.3 had un-lawfully sub-let the premises to the applicants. It was also held that the ground that the suit premises were reasonably and bonafide required by the respondent nos.1 and 2 stood proved, as also greater hardship would be caused to the respondent nos.1 and 2-plaintiffs.

11. Learned counsel for the applicants in challenging the orders passed by the appellate bench has principally urged that the suit was barred by limitation. It is thereafter, contended that the applicants were in lawful use and occupation of the premises being inducted by the original tenant-late Gangabai wife of Mahadeo Abaji Gavankar under a conducting agreement and that the suit premises were being used for residential and commercial purpose and thus, greater hardship will be caused to the applicants if called upon to vacate the suit premises. It is submitted that the occupation of the applicants was clearly to the knowledge of the respondent nos.1 and 2 and hence the finding in regard to the change of user as rendered by the appellate bench is also erroneous. On the other

hand, learned counsel for the respondent nos.1 and 2 landlords have supported the findings of the appellate bench.

12. Having heard the learned counsel for the parties and having perused the judgements of the learned trial Judge and the appellate bench of the Small Causes Court in my opinion, the contentions as urged on behalf of the applicants cannot be accepted. It is not in dispute that the original tenant of the suit premises was one Mahadeo Abaji Gavankar who expired in the year 1968 who during his life time had started the business of eating house in the name and style of 'Samarth Club'. On his demise, his late wife Gangabai Mahadeo Gavankar and son Shrikrishna Mahadeo Gavankar (respondent no.3/defendant no.1) inherited the tenancy rights. It is also not in dispute that late Gangabai inducted one Ramchandra Sahadeo Prabhupatkar and his legal representatives under a conducting agreement for leave and licence for a period of 11 months. It is also not in dispute that there was no previous permission obtained by Gangabai from the respondent nos.1 and 2-landlords before she inducted Ramchandra Sahadeo Prabhupatkar into the suit premises to conduct a eating house business. Though the licence as granted by late Gangabai had expired Ramchandra Prabhupatkar had continued to remain in occupation of the premises which was certainly not a legal occupation and being conscious

about the same, Ramchandra Sahadeo Prabhupatkar instituted R.A.E.Suit no.2909 of 1981 against the landlords for a declaration that Ramchandra Prabhupatkar was the tenant of the landlords. The suit however, was dismissed and an appeal against the same also came to be dismissed by the appellate bench of the Small Causes Court. The concurrent orders of both the Courts were confirmed by this Court by its order dated 15.2.2017 rejecting civil revision application no.141 of 2014 as noted above.

13. Thus, it is clear that the applicants failed to establish their tenancy and any other legal right to occupy the suit premises. Such a factual situation having clearly emerged, revealing that the applicants were not the tenants then in what capacity they were in occupation of the suit premises ? The appellate bench holding that there was no legal sanctity to the occupation of the applicants on the above clear and admitted facts cannot be faulted. The occupation of the applicants of suit premises was certainly illegal and without the consent of the respondent nos.1 and 2 landlords or their predecessors, as is clear from the evidence on record as also the earlier round of litigation.

14. In regard to the grounds of change of user, unlawful subletting and bonafide requirement, seeking eviction of the tenant

(respondent no.3) these were the grounds of eviction clearly available only against the tenant namely respondent no.3-defendant no.1. Respondent no.3/defendant no.1 tenant having failed to appear and contest the suit, the said grounds remained undefended by the tenant, however irrespective of this, appreciating the evidence on record, the appellate bench of the Small Causes court has considered each of these grounds and has recorded a finding that these grounds of eviction stood proved.

15. As regards the ground of unlawful subletting the occupation of the premises was not that of the respondent no.3-tenant who was the successor of the original tenant but that of the applicants who could not prove that they were entitled to occupation of the suit premises in the absence of any consent/permission as given by the respondent no.2/landlord. Moreover the applicants had failed in their suit seeking a declaration of tenancy. To conclude, there was unlawful subletting by the original tenant now respondent no.3 (defendant no.1.

16. As regards the ground of bonafide requirement of the landlords/respondent nos.1 and 2 the same was proved on evidence. PW 1 Satish Raghunandan Rele (plaintiff no.2), deposed that he is carrying business of sound recording for drama and TV serial since the year 1971

from premises of the third parties on payment of rent. PW 1 placed on record, the bills issued by different landlords charging rent for such occupation from PW 1 which was about Rs.5000/- per month. All bills which are for different periods of time were placed on record and proved. Thus, despite their own premises being available respondent nos.1 and 2 were required to rent out premises.

17. It needs to be noted that the appellate bench of the Small Causes Court on different grounds of eviction as pressed into service by respondent nos.1 and 2 plaintiffs in paragraph 45 of its judgement has made the following observations, which in the facts and circumstances cannot be faulted :-

45."After having discharged the initial burden upon them as regards the establishment of the bonafide requirement, onus oscillated upon the defendant no.1 to prove otherwise. But the defendant no.1 chose to shy away from the proceeding. So far as the defendant nos.2 to 7 are concerned, there is no need to take into account their bonafide requirement being the unlawful occupants. Hence, the bonafide requirement deserves to be answered in favour of plaintiffs."

18. In regard to the submission on limitation as urged on behalf of the applicant that the suit was barred by limitation in my opinion, the same is wholly unfounded. It is contended on behalf of the applicant that respondent no.,1 landlord was aware of the possession of the applicants since the year 1981 and hence the eviction suit could not have been instituted in the year 2007, and the same was time-barred. In my

considered opinion, the appellate bench has rightly rejected this contention of the applicants inter alia taking into consideration R.A.E.Suit No.2509 of 1981 as instituted by Ramchandra Sahadeo Prabhupatkar, which was throughout contested by the respondent no.2-landlord and which attained finality in the civil revision application no.141 of 2014 being rejected by this Court by an order dated 15.2.2017. It needs to be noted that in the meantime the suit in question (R.A.E.& R Suit no.758/1121/2010) was filed by the respondent seeking eviction of the tenant-respondent no.3. The suit clearly alleged grounds of eviction inter alia of change of user, bonafide requirement, arrears of rent against the tenant-respondent no.3 (defendant no.1) and the applicants were joined as parties as illegal occupants. Thus, it cannot be said that when the suit raised such grounds against the tenant, the suit was in any manner barred by limitation. In making the argument on limitation, the applicant has overlooked that the suit was principally against the tenant-respondent no.3 and on the grounds of eviction as available under the Rent Act. The findings of the appellate bench in this regard, paragraph nos.54 to 58 needs to be noted:

54. *"On the point of limitation it is deposed by DW 1 that defendant nos.2 to 7 are in use and occupation of the suit premises since the year 1972. Furthermore, on the strength of pleadings by plaintiffs themselves to the effect that defendant nos.2 to 7 are in illegal occupation of the suit*

premises since the year 1997, the suit in the year 2010 i.e. after 33 years is hopelessly time barred.

55. *The further basis to regard the suit as time barred is that in any event, plaintiffs were aware of the possession since the year 1981 when defendant nos.2 to 7 instituted the R.A.D.Suit no.2509 of 1981. So also defendant nos.2 to 7 instituted Municipal Appeal in the year 2002. As a result if not from 1976 then at least from 1981 or from the year 2002 plaintiffs are aware of the possession of defendants over the suit premises. Accordingly, the suit for eviction in the year 2007 is regarded as time barred.*

56. *We have given thoughtful consideration on the argument advanced. At the outset, it needs to be noted that there is no basis to hold that plaintiffs were aware of the possession of defendants in the suit premises since the year 1976. Even otherwise, the said contention appears to be shady in view of the fact that in the earlier part of his evidence DW 1 to be specific, in para 5 of his examination-in-chief has stated that defendants are in exclusive use and occupation of the suit premises since 01/04/1972. Both these aspects cannot go hand in hand. The possession can be either from 01/04/1972 or since the year 1976. Apart from that as per the evidence of DW-1 himself the RAD Suit no.2509 of 1981 has been instituted by defendants seeking declaration of tenancy. The decision in the said R.A.D.Suit culminated into the ultimate finding in civil revision application no.141 of 2014 by the Hon'ble Bombay High Court as on 15.2.2017. Hence in between the year 1981 till 2017 the plaintiffs are resisting the claim of the defendants as regards the tenancy over the suit premises As a result of that by no stretch of imagination it can be said that the suit is time barred for want of action on the part of plaintiffs.*

58. *Considering all these aspects, it emerges that the suit is well within limitation. Hence, we answer the Point no.8 accordingly.*

(Emphasis supplied)

19. The above findings are wholly supported on the facts on record and are within the frame work of law and cannot be faulted. The learned counsel for the applicants in supporting this submission on the suit being barred by limitation has placed reliance on the decision of the learned single Judge of this Court in Taherbhai Taiyebhai Poonawalla &

ors vs G.Hamid Hasan Patel & ors 2007 (1) Bom C.R.23. Considering the facts of the case and the background of litigation, in my opinion, this decision would not be of any avail to the applicants, as in the facts of the present case, the respondent nos.1 and 2-landlords till the year 2017 contested the claim of tenancy of the applicants.

20. In the above circumstances, the impugned judgement and order passed by the appellate bench of the Small Causes Court is eminently just. There is no jurisdictional error.

21. There is no merit in this civil revision application. It is rejected. No costs.

22. Respondent no.3 and the applicants shall hand over the possession of the premises to respondent nos.1 and 2 within eight weeks from today.

{G.S.KULKARNI, J}